Supreme Court, U.S.
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No. 89-721

In The

Supreme Court of the United States

October Term, 1989

SYLVIA AVERBACH,

Petitioner,

v.

RIVAL MANUFACTURING COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT, RIVAL MANUFACTURING COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the issue of whether the District Court erred in dismissing the jury after the first phase of a bifurcated trial ripe where the second phase has not commenced, and, if so, did the discharge of the jury after the first phase of this bifurcated civil fraud case impinge upon the plaintiff's Seventh Amendment rights where the first phase addressed the sole issue of fraud and the second phase is to address causation and damages?

2. Did the District Court, as affirmed by the Court of Appeals, abuse its discretion in denying the plaintiff leave to amend her Complaint to assert a new claim under the RICO Act, a claim under the Consumer Products Safety Act, a claim for relief in equity, and a more specific claim for fraud and misrepresentation where the first Motion did not include a proposed Amended Complaint and her second Motion was filed only four days before the discovery deadline and included a proposed Amended Complaint that was identical to a Complaint filed nine months earlier (and subsequently dismissed) in a separate action?

3. Is the issue of whether the plaintiff has a private right of action under the Consumer Products Safety Act, 15 U.S.C. § 2051 *et seq*, ripe where it was not raised by the plaintiff in the District Court or in the Court of Appeals and where no conflict of law exists between the Courts of Appeals that no private right of action exists under the Consumer Products Safety Act?

RULE 28.1 LIST

The only parent company of a respondent is Rival Holdings, Inc. The only subsidiary of respondent which is not wholly owned is Bennington Properties, Inc. The respondent does not have any affiliated companies.

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BRIEF FOR RESPONDENT, RIVAL MANUFACTURING COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Rival Manufacturing Company, respectfully requests that this Court deny the Petition for Writ of Certiorari concerning the dismissal of the jury after one phase of a bifurcated civil fraud case, the District Court's denial of the plaintiff's two Motions to Amend her Complaint, and the existence of a private right of action under the Consumer Products Safety Act, 15 U.S.C. § 2051 *et seq.*

OPINIONS BELOW

The Opinion of the Court of Appeals for the Third Circuit is reported at 879 F.2d 1196 (3d Cir. 1989); it is reprinted in the Appendix attached to the Petition (A-1). The District Court's Order of April 5, 1988 denying with prejudice the petitioner's Motion to Amend the Complaint to assert claims under RICO, Consumer Products Safety Act, and for equitable relief and to more specifically allege fraud and misrepresentation is reprinted in the Supplemental Appendix attached to this brief (S.A.-1). The District Court's Order of December 2, 1987 denying the petitioner's Motion to Amend the Complaint is reprinted in the Supplemental Appendix attached to this brief (S.A.-7).

JURISDICTION

The jurisdiction of the district Court was invoked originally under 28 U.S.C § 1331, and there was a pendent state law fraud claim. Additionally, there was diversity of citizenship even though jurisdiction on this basis was not alleged in the Complaint.

The jurdisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On April 21, 1978, Sylvia Averbach (Averbach), instituted an action against Rival Manufacturing Company

(Rival) in the United States District Court for the Eastern District of Pennsylvania in an effort to recover damages for losses allegedly sustained during a fire to her home. She alleged that the fire was caused by a knife sharpener/can opener, Model No. 731/1, manufactured by Rival. Averbach forwarded Interrogatories which were answered by Rival, and she asked in Interrogatory No. 40 whether Rival had within the past five years received complaints of an occurrence similar to that allegedly experienced by her. Rival's answer was that it was aware of an occurrence on December 7, 1976 in which it was claimed that Rival Model 731/1 Can Opener/Knife Sharpener caused a fire. Rival denied that claim, and it was dropped by the claimant.

On February 24, 1978, counsel for Averbach wrote to the Consumer Products Safety Commission (CPSC) inquiring as to other fires allegedly involving Rival can openers, but no response was received.

Averbach's case proceeded to trial, and the jury found in favor of Rival on June 5, 1981. Judgment was entered on the verdict, and no appeal was taken by Averbach.

In August, 1983, counsel for Averbach allegedly learned from the CPSC in connection with an unrelated case that there may have been other fire incidents concerning can openers.

On September 28, 1984, Averbach filed a Motion for New Trial under Federal Rule of Civil Procedure 60(b) and alleged that Rival had failed to answer Interrogatories accurately. The District Court denied Averbach's Motion, and this denial was affirmed by the Court of

Appeals for the Third Circuit by judgment Order on October 31, 1985. *Averbach v. Rival Manufacturing Co.*, 779 F.2d 41 (3d Cir. 1985). Averbach's Petition for Rehearing was denied on December 9, 1985. The present action was filed in May, 1985, and asserted a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.* and a claim for common law fraud based on allegations that Rival had fraudulently withheld relevant evidence from her and that, as a result of this conduct, the plaintiff, the court and the jury were deceived.

On November 18, 1985, the District Court dismissed the Complaint because Count One failed to state a claim upon which relief could be granted under RICO and specifically under 18 U.S.C. § 1962(c) and that Rival did not conduct or participate in the conduct or affairs of the United States District Court; the pendent state law claim in Court Two was dismissed because the Complaint did not allege jurisdiction based upon diversity of citizenship. A Motion for Leave to Amend was denied because it did not cure the grounds for dismissal. Averbach then filed a Motion for Reconsideration and a Motion for Leave to Amend the Complaint in order to allege jurisdiction based upon diversity of citizenship. Both Motions were denied on March 11, 1986.

On appeal to the Court of Appeals for the Third Circuit, the dismissal of the RICO count was affirmed because of the court's conclusion that Rival did not conduct or participate in the conduct of the affairs of the purported enterprise. The Third Circuit reversed the dismissal of the common law fraud count, finding that the Complaint sufficiently stated a cause of action. *Averbach*

v. Rival Manufacturing Co., 809 F.2d 1016 (3d Cir. 1987). In June, 1987, plaintiff filed a separate action in state court, reasserting the RICO and common law fraud counts, and also asserting a claim for negligent and intentional misrepresentation and a claim under the Consumer Products Safety Act. That action was removed to federal court, and was dismissed by the District Court as the improper splitting of a cause of action. The dismissal was affirmed by the Court of Appeals for the Third Circuit on April 21, 1988. *Averbach v. Rival Manufacturing Co.*, 845 F.2d 1009 (3d Cir. 1988).

In October 1987, the plaintiff sought leave to amend her Complaint to reassert the RICO claim and to assert additional facts with regard to the fraud claim as well as to assert a claim for violation of the Consumer Protection Act and a claim for equitable relief. However, she failed to attach a copy of the proposed Amended Complaint and the District Court was unable to evaluate the Motion. Therefore, the Motion to amend the Complaint was denied without prejudice to its renewal insofar as it sought to assert additional facts or a claim for violation of the Consumer Protection Act; it was denied with prejudice with respect to the RICO claim. (S.A.-7)

Petitioner filed another Motion to amend her Complaint on March 11, 1988, four days before the discovery deadline which, by court Order of January 6, 1988, was not to be extended further. The proposed Amended Complaint was identical to the Complaint filed in June, 1987 and subsequently dismissed. (S.A.-1)

Trial was bifurcated with the first phase to address only the fraud issue and the second phase to address

causation and damages. The jury found in favor of the plaintiff after the first phase. The District Court discharged the jury to avoid prejudice to Rival, continued the commencement of the second phase, and instructed Rival to file a Motion for Judgment Notwithstanding the Verdict and Motion for New Trial concerning the first phase. Rival's Motion for Judgment Notwithstanding the Verdict was granted. On appeal, the Court of Appeals for the Third Circuit reversed the granting of judgment notwithstanding the verdict and affirmed the District Court's denial of the plaintiff's two Motions to Amend Complaint. The Court stated that its disposition made it unnecessary for it to rule upon the plaintiff's contention that the District Court erred in dismissing the jury after the first phase of the bifurcated trial. *Averbach v. Rival Manufacturing Company*, 879 F.2d 1196 (3d Cir. 1989).

REASONS FOR DENYING THE WRIT

1. **This case does not involve an issue in which there has been a conflict among the Courts of Appeals and it does not present any important question of law justifying review by this Court.**

There is no claim by Averbach that the decision of the Court of Appeals for the Third Circuit is in conflict with the decision of any other Court of Appeals. The decisions of the District Court and the Court of Appeals were based upon the specific facts of this case, and it is unlikely that review of the issue presented by Averbach will impact anyone other than the litigants. Accordingly, this case does not present any issue justifying review by this Court

in light of the correct decisions of the District Court and Court of Appeals.

2. The issue of the discharge of the jury is not ripe; even if it is ripe, the discharge of a jury is not in violation of the Amendment after the determination of one issue in a bifurcated civil fraud trial.

In *Averbach v. Rival Manufacturing Co.*, 879 F.2d 1196, 1202 (3d Cir. 1989) the Court of Appeals stated that Averback will be able to obtain review of claims of error related to the issue of the dismissal of the jury after the first phase of the bifurcated trial if she is aggrieved by the final outcome of the proceedings. The final outcome of the case has not been determined. The second phase of the trial (causation and damages) has not occurred and, therefore, it is impossible to determine whether Averbach has been aggrieved. Accordingly, this Court should not now entertain this issue.

Even if this Court concluded that this issue is ripe, the District Court did not err in discharging the jury after the first phase. In view of the different issues and proof required to establish fraud, causation and damages, and undue prejudice to Rival, the District Court properly discharged the jury. Federal Rule of Civil Procedure 42(b) provides as follows:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, crossclaim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims or

> issues, also preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

Many Courts of Appeals and District Courts have addressed the question of whether separate issues in the same trial may be tried before different juries, and the applicable law has been summarized as follows:

> Some question has been raised whether issues can be ordered tried for different juries. There is no constitutional problem in ordering separate trials of issues, with the same jury to sit in each trial. It seems to be acceptable that the better and preferred practice is to use the same jury for all issues, even though it may hear the issues at different times.
>
> The issue can thus be narrowed to whether the admittedly preferred procedure is constitutionally required. It has been held, on sound ground, that the Seventh Amendment is not violated by the separate submission of the issues to a single jury. Is there a violation of the constitutional provision if issues are separately submitted to separate juries? The answer rather clearly must be in the negative. When a single jury is passed on all issues, but error has tainted its verdict on one of the issues, it is now quite settled that there may be a new trial before a second jury limited to that single issue, provided that the error requiring a new trial has not affected the determination of any other issue. In this instance, the result is that different juries ultimately resolve the issues. An argument that two juries may be used if one jury has first decided all of the issues – though its verdict as to one of them has passed out of the case – but that two juries may not be used in the first instance seems untenable. The great guarantee

> of the Seventh Amendment will hardly support such a gossamer distinction.

9 Wright & Miller, *Federal Practice and Procedure* § 2391 at 302 to 303 (1971 and Supp. 1988) (footnotes omitted); *see also* cases cited therein. It has been held that a significant consideration is whether resolution of a single issue would be dispositive of the entire claim. *In Re Beverly Hills Fire Litigation*, 695 F.2d 207 (6th Cir. 1982), cert. denied, 461 U.S. 929, 103 S.Ct. 2090, 77 L.Ed.2d 300 (1983). Further, an Order directing that separate issues be tried before different juries is within the discretion of the District Court. See *Dewald v. Minster Press Co.*, 494 F.2d 795 (6th Cir. 1974).

Petitioner has merely reiterated verbatim her argument that the District Court committed plain error by dismissing the jury after the conclusion of phase one of the trial and has attempted to make a Seventh Amendment argument when none exists. Petitioner's attempt to shoestring an argument using *Arthur Young and Co. v. United States District Court*, 549 F.2d 686 (9th Cir. 1977), cert. denied, 434 U.S. 829, 98 S.Ct. 109, 54 L.Ed.2d 88 (1977) is meritless and simply not applicable either legally or factually to the present action.

3. The District Court, as affirmed by the Court of Appeals, did not abuse its discretion in concluding that Averbach did not have the right to amend her Complaint in light of the previous denials which purported to assert a new claim under the RICO Act, a claim under the Consumer Products Safety Act, a request for equitable relief, and a more specific claim based on fraud and misrepresentation.

Averbach's claim under the Racketeer Influenced and Corrupt Organization Act (RICO) was dismissed by

the District Court on November 18, 1985 and her Motion for Reconsideration was denied on March 11, 1986. The dismissal of the RICO count was affirmed by the Third Circuit Court of Appeals on January 20, 1987. *Averbach v. Rival Manufacturing Co.*, 809 F.2d 1016 (3d Cir. 1987), cert. denied, 107 S.Ct. 3187 (1987). In June, 1987, Averbach filed a separate action in state court, reasserting the RICO and common law fraud counts, and also asserting a claim for negligent and intentional misrepresentation, a claim under the Consumer Products Safety Act, and a claim for equitable relief. That action was removed to federal court and was dismissed by the District Court, and the Court of Appeals for the Third Circuit affirmed the denial. *Averbach v. Rival Manufacturing Co.*, 845 F.2d 1009 (3d Cir. 1988).

In October, 1987, Averbach sought leave to amend her Complaint to reassert a RICO claim and to assert additional facts with regard to the fraud claim as well as to assert a claim for violation of the Consumer Protection Act. On December 2, 1987, the District Court denied the Motion with prejudice with respect to the attempts to reassert a RICO claim and without prejudice with respect to any other effort to amend the Complaint. The Court specifically stated that it was unable to evaluate the Motion because Averbach failed to attach a copy of the proposed Amended Complaint, and Averbach was instructed that any renewed Motion must be accompanied by the proposed Amended Complaint. (S.A.-7)

On March 11, 1988, Averbach filed another Motion to Amend the Complaint in an effort to again assert a RICO claim, a claim under the Consumer Products Safety Act, a claim for equitable relief, and a more specific claim based

upon fraud and misrepresentation. The proposed Amended Complaint which was attached to the Motion was the *exact same* Complaint which was filed in June, 1987 and subsequently dismissed. Review of the proposed Amended Complaint shows that Averbach did not rely on any information obtained in discovery in the present action in order to make additional factual allegations or to present claims under different theories than those which had been made in the original Complaint. Because the proposed Amended Complaint was identical to the Complaint filed in June, 1987, Averbach obviously had sufficient information to make the allegations which she wanted to make in March, 1988 at least as early as June, 1987 when she filed the Complaint in the other action. Therefore, the Third Circuit did not err in holding that the District Court did not abuse its discretion in the denial of the request to amend the Complaint. *See Lewis v. Curtis*, 671 F.2d 779 (3d Cir.) cert. denied, 459 U.S. 880 (1982).

Petitioner notes the case of *Prudential Ins. Co. v. U.S. Gypsum Co.*, 711 F.Supp. 1244 (D.N.J. 1989) which is not applicable either legally or factually to the present action. Moreover, if the holding was applicable, the case reaffirms the law that an amendment should only be allowed if it does not prejudice the opposing party. This issue has already been decided by the District Court and Court of Appeals on various occasions. The Court of Appeals correctly concluded that:

> Obviously, Averbach suffered no adverse consequences from the inability to amend the fraud count in light of her success on that issue. As the District Court concluded, adding a CPSA claim, even if legally viable, would introduce

> new issues into this already protracted litigation. Finally, we agree that Averbach's attempt to resurrect her previously dismissed RICO count eight months after this court affirmed the dismissal of that claim represented too long a delay. 879 F.2d at 1203.

Although amendment should be freely permitted, in this case the District Court's grounds, as set forth in its opinion, demonstrate that its decision to deny Averbach leave to amend was within the permissible range of its discretion.

4. The issue of the existence of a private right of action under the Consumer Products Safety Act has not been raised by the plaintiff in the District Court or the Court of Appeals so it cannot be raised in the Supreme Court; further, there is no basis on the merits for review of this issue by the Supreme Court.

In this litigation which has been in existence since 1978, the plaintiff has not addressed the issue of whether a private right of action exists under the Consumer Products Safety Act. Specifically, the plaintiff did not raise this issue in the District Court or in the Court of Appeals in the case which is now before this court. Further, neither the District Court nor the Court of Appeals has acted *sua sponte* in addressing this issue. The plaintiff cannot be permitted to bring before this Court an issue which has not been before any lower court in this case.

Rule 17 of this Court expressly states that the Court will have discretion to review a writ of certiorari when a federal Court of Appeals has rendered a decision in conflict with the decision of another federal Court of Appeals

on the same issue. Respondents have no difficulty in agreeing with the cases cited by petitioner which hold that there is no private cause of action under the Consumer Protection Safety Act. *Drake v. Honeywell*, 797 F.2d 603 (8th Cir. 1986); *Kelsey v. Muskin*, 848 F.2d 39 (2nd Cir. 1988); *Zepik v. Tide Water Midwest, Inc.*, 856 F.2d 936 (7th Cir. 1988); *Benitez-Allende v. Alcan*, 857 F.2d 26 (1st Cir. 1988). However, petitioner does not cite any case by any Federal Court of Appeals which are distinguishable from these cases.

Petitioner does cite *Swenson v. Emerson Electric Co.*, 374 N.W.2d 690 (Minn. 1985), cert. denied, 746 U.S. 1130, 90 L.Ed.2d 678, 106 S.Ct. 1998 (1986) and a few District Court cases, but they were decided before the present line of Circuit Court cases. Therefore, petitioner's third issue is a non-issue in this case and is not ripe for determination by this Court.

This argument is yet another attempt to circumvent the holdings of the District Court and the Court of Appeals in this already protracted litigation case. To allow the petitioner to raise this issue would make a continued mockery of the appeals process.

CONCLUSION

For the reasons set forth above, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SYLVIA AVERBACH	:	CIVIL ACTION
v.	:	NO. 85-2794
RIVAL MANUFACTURING COMPANY	:	

ORDER

(Filed Apr. 5, 1988)

HUYETT, J.

Upon consideration of plaintiff's motion to amend the complaint, defendant's response, the memoranda submitted by the parties, and because:

1. Plaintiff's original complaint, filed May 17, 1985, asserted claims under the Racketeering Influenced and Corrupt Organizations Act and for common law fraud.

2. On November 19, 1985 I granted defendant's motion to dismiss the complaint in its entirety, and denied as moot plaintiff's motion to amend her complaint to assert diversity jurisdiction. The Court of Appeals for the Third Circuit affirmed the dismissal of the RICO count, agreeing with this court that the plaintiff's complaint, which identified the United States District Court as the RICO "enterprise", did not state a cause of action. The Court of Appeals reversed the dismissal of the fraud count. *Averbach v. Rival Mfg. Co.*, 809 F.2d 1016 (3d Cir.), *cross petitions for cert. denied*. 107 S. Ct. 3187, 108 S. Ct. 83 (1987).

3. In June 1987, plaintiff filed a second action in the Court of Common Pleas of Philadelphia County. The new complaint asserted claims under RICO, the Consumer Safety Protection Act, and for common law fraud and misrepresentation. The case was removed to this court and assigned Civil Action Number 87-3952. I granted the defendant's motion to dismiss because the action was the improper splitting of a cause of action. I also ruled that the RICO claim contained in the second action was barred by principles of res judicata. The decision has been appealed to the Court of Appeals for the Third Circuit, which has yet to rule.

4. On October 22, 1987 plaintiff filed a second motion to amend her complaint. On December 2, 1987 I denied with prejudice the motion insofar as it sought to renew the RICO claim. Because plaintiff had not submitted a copy of her proposed amended complaint for the court's review. I was unable to giver proper consideration to the motion and to defendant's argument that the amended complaint would fail to state causes of action.[1] I therefore denied without prejudice the motion to amend the complaint to assert additional facts in support of the fraud claim or to assert claims for violation of the Consumer Protection Act and for equitable relief. I noted that any renewed motion to amend must be accompanied by the proposed amended complaint.

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[1] Although plaintiff failed to submit a copy of the proposed amended complaint with her motion, defendant's response to the motion rested on the assumption that the proposed amended complaint would confirm to the complaint which had been filed in C.A. 87-3952.

5. Plaintiff took no further action regarding her motion to amend the complaint until March 11, 1988, when she filed a third motion to amend. The proposed amended complaint submitted with this motion is identical to the complaint filed in 87-3952. Plaintiff again seeks to assert a claim for a RICO violation, naming the defendant Rival Manufacturing as the enterprise. Plaintiff also seeks to assert a claim under the Consumer Safety Protection Act. She seeks to assert a separate count seeking "whatever equity relief is just, proper and necessary." Finally, she seeks to allege additional facts in support of her claim for fraud and misrepresentation.

6. The deadline for all discovery in this action passed on March 15, 1988. A proposed final pretrial order has been completed by the parties and submitted to chambers, as required by my procedural order of November 9, 1987, as amended January 6, 1988. While the pretrial order requires revision, the parties will be required to submit the revised pretrial order within 5 days of this order. This action is listed for trial on April 25, 1988. I intend to try this case as promptly as possible.

7. The Plaintiff's third motion to amend was filed thirty-four months after this action was originally filed. More importantly, it was filed more than three months after the denial of the second motion to amend the complaint. This delay was not justified by a need for discovery to support the motion to amend; the proposed amended complaint is identical to the complaint filed nearly a year ago in 87-3952. For reasons unknown to the court, plaintiff chose not to file this motion until four days before the close of discovery and barely one month before the trial date.

8. While leave to amend shall be freely granted when justice so requires, Fed.R.Civ.P. 15(a), it is well within the discretion of the court to deny leave to amend where there has been undue delay coupled with undue prejudice to the defendant. *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *Howze v. Jones & Laughlin Steel Corp.*, 750 F.2d 1208, 1212 (3d Cir. 1984); *Adams v. Gould, Inc.*, 739 F.2d 858, 868 (3d Cir. 1984), *cert. denied*, 469 U.S. 1122 (1985); *Merican, Inc. v. Caterpillar Tractor Co.*, 596 F. Supp. 697, 704-05 (E.D. Pa. 1984).

9. It is apparent that there has been undue delay in this matter. While plaintiff may have been justified in not seeking to amend her complaint in this court while the action was pending on appeal, there has been no explanation offered for the failure to renew the motion to amend promptly after the denial of the second motion to amend. The fact that the proposed amended complaint is identical to that filed in a separate action in 1987 establishes that this motion could have been filed promptly after the previous motion was denied on the ground that no proposed complaint had been submitted to the Court. Plaintiff was aware of the impending discovery deadline, and of the Court's clear order that no further extensions of that deadline would be granted. While there is no evidence that plaintiff has acted in bad faith, it is clear that there has been undue delay.

10. Insofar as the complaint seeks to assert a claim for violation of the Consumer Safety Protection Act, it is equally apparent that the defendant has been prejudiced by this delay. To permit amendment of the complaint to assert such a claim would require additional and possibly duplicative discovery. It would necessarily delay the trial,

further prolonging litigation which has already been pending for nearly three years. Under these circumstances, I will not allow plaintiff to assert new theories of recovery on the eve of trial.

11. Moreover, the new claims contained in the proposed amended complaint would not withstand a motion to dismiss. For reasons stated in my previous memoranda and orders, plaintiff will not be permitted to renew her RICO claim. I note, in addition, that the proposed amended complaint, which purports to identify the defendant as the RICO enterprise, fails to state a cause of action under 18 U.S.C. § 1962(c). *B.F. Hirsch v. Enright Refining Co., Inc.*, 751 F.2d 628, 634 (3d Cir. 1984).[2] The proposed claim under the Consumer Product Safety Act fails to identify the consumer product rule or order which is alleged to have been violated, leaving the defendant uninformed of the basis of the claim against it. 15 U.S.C. § 2072(a). The claim for equitable relief is unsupported by any suggestion of why such relief would be appropriate in this action.

12. Moreover, plaintiff has been on notice of these defects in her proposed amended complaint since defendant filed its response to her second motion to amend the complaint.[3] Plaintiff has made no effort to cure those

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[2] Although the proposed amended complaint does not so state, it appears that plaintiff seeks to assert a claim under 18 U.S.C. § 1962(c).

[3] Although no proposed amended complaint was submitted with that motion, defendant's response was based on the assumption that the amended complaint would be identical to the complaint which was filed in 87-3952, and which has now been attached to the third motion to amend the complaint.

deficiencies. It is therefore appropriate that the motion to amend the complaint to assert claims under RICO, under the Consumer Safety Products Act, and for equitable relief be denied with prejudice.

13. There remains to be considered that portion of the proposed amended complaint which seeks to assert a more definite statement of her claims for fraud and misrepresentation. There has been no objection raised by the defendant that the complaint is not sufficiently specific in this regard. See Fed.R.Civ.P. 9(b). Therefore, I see no need to complicate this action at this juncture by permitting an amended complaint.

Therefore, IT IS ORDERED that the plaintiff's third motion to amend her complaint is DENIED with prejudice.

IT IS SO ORDERED.

ENTERED: 4/5/88

/s/ Daniel H. Huyett
Daniel H. Huyett, 3rd, Judge

CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SYLVIA AVERBACH	:	CIVIL ACTION
v.	:	NO. 85-2794
RIVAL MANUFACTURING COMPANY	:	

ORDER

(Filed Dec. 2, 1987)

HUYETT, J.

Upon review of plaintiff's motion to amend the complaint, defendant's response, defendant's letter to the Court dated November 17, 1987, and because:

1. The history of the litigation between the parties has been set forth in full elsewhere. *See* Memorandum and Order, *Averbach v. Rival Manufacturing Co.*, C.A. 87-3952 (E.D. Pa. Oct. 13, 1987). Plaintiff's claim under the Racketeering Influenced and Corrupt Organization Act (RICO), 18 U.S.C. § 1961, *et seq.*, was dismissed by this court on November 18, 1985. Plaintiff's motion for reconsideration was denied on March 11, 1986. The dismissal of the RICO count was affirmed by the Third Circuit Court of Appeals on January 20, 1987. *Averbach v. Rival Manufacturing Co.*, 809 F.2d 1016 (3d Cir. 1987), *cert. denied*, 107 S. Ct. 3187 (1987). The Third Circuit reversed the dismissal of the common law fraud count, finding that the complaint sufficiently stated a clause of action. Thereafter, plaintiff filed a separate action in state court, reasserting the RICO and common law fraud counts, and also asserting a claim for negligent and intentional misrepresentation and a claim under the Consumer Product

Safety Act. That action was removed to federal court, and was dismissed by this Court. Memorandum and Order. *Averbach v. Rival Manufacturing Co.*, C.A. 87-3952 (E.D. Pa. Oct. 13, 1987).

2. Plaintiff now seeks leave to amend her complaint in this action to reassert the RICO claim, to assert additional facts with regard to the fraud claim, and to assert a claims for violation of the Consumer Protection Act.

3. As I stated in my memorandum in civil action 87-3952, a litigant may not expect to be given repeated bites at the apple when she fails to prevail on her original theories. Plaintiff has had an ample opportunity to litigate her RICO claim, and has failed in this court and on appeal. To permit a litigant to drag an opponent through multiple appeals, and to come forth two years later with an amended complaint to remedy the defects of the original, would make a mockery of the principle of *res judicata*. Therefore, I will not permit plaintiff to reassert her RICO claim.

4. As to plaintiff's additional cause of action for violation of the Consumer Protection Act, and to allege additional facts in support of the common law fraud count, I note that the plaintiff has failed to attach a copy of the proposed amended complaint. Thus, the Court is unable to evaluate this motion.

5. Therefore, IT IS ORDERED that the motion to amend the complaint is DENIED WITHOUT PREJUDICE to its renewal insofar as it seeks to assert additional facts or a claim for violation of the Consumer Protection Act. Any renewed motion must be accompanied by the proposed amended complaint. Insofar as the plaintiff seeks

to renew her RICO count, the motion is DENIED WITH PREJUDICE.

IT IS SO ORDERED.

/s/ Daniel H. Huyett
Daniel H. Huyett, 3rd, Judge